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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 United States of America,
9 Plaintiff,
10 vs.
11 Oscar Jesus Ruiz-Hernandez,
12 Defendant.
13

No. CR 16-511-TUC-CKJ

ORDER

14 Pending before the Court is the Motion to Suppress (Doc. 50) filed by Oscar Jesus
15 Ruiz-Hernandez ("Ruiz-Hernandez"). A Response (Doc. 54), a Supplemental Memorandum
16 (Doc. 64) and a Response to Supplemental Memorandum (Doc. 66) have been filed.
17 Evidence and argument were presented to the Court on February 13, 2017.

18
19 *I. Factual and Procedural History*

20 *A. Agreements of the Parties*

21 During the February 13, 2017, hearing, counsel for Ruiz stated that he agreed the
22 statistical summary provided by the government regarding immigration and narcotic-related
23 events and other arrests at the checkpoint at issue in this case is accurate. Ex. 14; *see also*
24 Response (Doc. 54), p. 7.

25 Counsel also agreed that the fact that the Arizona state route 80 ("SR80") checkpoint
26 is within 100 air miles of the international border is not in dispute and is in compliance with
27 relevant federal regulations.
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1 B. *Summary of the Testimony of Helso Lara*

2 Immigration and Customs Enforcement (“ICE”) Officer Helso Lara (“Agent Lara”)
3 previously served as a Border Patrol Agent for approximately six years.¹ He was trained at
4 the United States Border Patrol Agent Academy in Artesia, New Mexico and received course
5 work in immigration law, nationality law, seizures (including the Fourth Amendment), TAC
6 weapons, and tactics instruction. Officer Lara was previously a legal facilitator in the United
7 States Marine Corps and an investigative assistant for the Naval Criminal Investigative
8 Services.

9 Officer Lara was assigned to checkpoint duty for approximately one year to one year
10 and three months during 2012-2013 and 2015-2016; each rotational assignment lasted three
11 to six months. On February 19, 2016, he was assigned as a Border Patrol agent to work the
12 SR80 checkpoint. The SR 80 Checkpoints is approximately five miles north of Tombstone,
13 between Tombstone and Benson. It is at approximately where SR80 intersects with Arizona
14 state route 82 (“SR82”). The checkpoint is approximately 40 to 50 miles from the
15 international border. There are signs (about one to two miles south of the checkpoint)
16 notifying persons approaching the checkpoint that an immigration checkpoint is ahead and
17 signs to incrementally reduce speed.

18 Persons/vehicles entering the checkpoint present themselves in an area where there
19 is a stop sign. A primary agent stands in that primary inspection area. When a vehicle comes
20 to the primary inspection area, Agent Lara, as a primary inspection officer, questions the
21 occupants about their immigration status; i.e., he asks them their citizenship and ask them to
22 present documents if they are not U.S. citizens. Once a person is established to be legally
23 in the country, Agent Lara would complete the encounter. If an agent has suspicion to look
24 further into the vehicle, the vehicle/occupants are referred to the secondary inspection area.
25 For example, such a referral may occur for safety reasons or if a canine has provided a basis
26 for a referral. Canine teams patrol before the primary inspection area.

27 ¹Although this witness is now Officer Lara, the Court will refer to him as Agent Lara
28 as he was a Border Patrol Agent at the time of the incident.

1 On February 19, 2016, Agent Lara was assigned to the primary inspection area and
2 primary duties. At approximately 6:50 a.m., the canine team moved from the pre-primary
3 inspection area (to return to the station).² The canine could be seen leaving the pre-primaty
4 area. Approximately, 30 seconds later, a 2008 Chevy Impala quickly approached the
5 checkpoint. The agent had not seen the vehicle stop elsewhere as if waiting for an opportune
6 time to enter the checkpoint. Although Agent Lara thought the timing of the vehicle with the
7 leaving of the canine was a little strange, he could not necessarily connect the two events.

8 Agent Lara asked the driver if he was a U.S. citizen.³ The driver looked a little
9 nervous – he looked straight ahead and was grabbing the steering wheel. After the driver
10 responded that he was a resident and not a U.S. citizen, Agent Lara asked to see his
11 documents. The driver provided his permanent resident card to the agent. The card
12 identified the driver as Ruiz-Hernandez. During this time, the agent felt that Ruiz-Hernandez
13 was in a hurry. There was no eye contact between the agent and Ruiz-Hernandez and one
14 hand of Ruiz-Hernandez continued to tightly grip the steering wheel.

15 While Agent Lara was inspecting the card, he asked Ruiz-Hernandez where he was
16 going – the driver responded that he was going to Tucson. Agent Lara had not completed
17 his inspection of the card (checking the holograms, attempting to ensure the card was valid)⁴,
18 when, within one minute of Ruiz-Hernandez stopping at the checkpoint, he asked if he could
19 have consent to look inside the trunk. He did not believe that there was anything in the trunk
20 that would help him ascertain whether Ruiz-Hernandez was legally within the United States.
21 Agent Lara used a normal speaking tone, but was wearing a uniform and had a holstered
22 weapon. The agent did not threaten Ruiz-Hernandez and did not raise his voice. Agent Lara

23
24 ²It was still a little dark outside, but stadium lights illuminated the checkpoint area.

25 ³Agent Lara, who is bilingual, does not recall if he asked the questions in English or
26 Spanish. It is his practice to first use English, but if a person responds in Spanish, he will
27 then continue the conversation in Spanish.

28 ⁴The agent could not recall, but believed that all he had yet to do in his inspection of
the card was to check to see whether the card had expired.

1 testified as follows:

2 Q. I guess just as a final question, why did you ask the defendant for consent to
search his trunk?

3 A. Why?

4 Q. Yes.

5 A. Just because of his nervousness. And you know, if he would have said no, he
6 would have -- he would have been free to go. I just felt like there was too much
nervous energy at one point that I just asked him. I didn't have any tools with me, so
7 the only thing I could do is ask for consent.

8 Transcript of February 13, 2017, Hearing (Doc. 68) ("TR"), pp. 38-39.

9 Ruiz-Hernandez responded yes to the request to look in the trunk. He either pulled a
10 trunk release lever or pushed a trunk release button; i.e., the driver unlatched the trunk from
inside the vehicle. If Ruiz-Hernandez had not consented to the search, the agent would have
11 ensured the card was valid, returned the card, and told Ruiz-Hernandez he was free to go.
12 Agent Lara went to the rear of the vehicle, opened the trunk, and saw overflowing packages
13 of marijuana. Not only was the odor of marijuana readily identifiable, but the packages were
14 similar to ones Agent Lara had previously seen used for packaging marijuana. There were
15 193 packages of marijuana, weighing approximately 301 pounds.
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18 *C. Summary of the Testimony of Raleigh Leonard*

19 Raleigh Leonard ("Deputy Chief Leonard") is the Acting Deputy Chief of Tucson
20 Sector Border Patrol. The Department of Homeland Security, Customs and Border
21 Protection include the Office Air/Marine, Office of Field Operations, and Border Patrol
agents (immigration officers).
22

23 Deputy Chief Leonard joined the Border Patrol in February of 1991. In 2006 he
24 accepted a promotion to the Yuma Sector. Deputy Chief Leonard was assigned checkpoint
25 duties in San Diego, California, and Yuma, Arizona, in the mid 1990s to early 2001 or 2001.
26 While performing those duties, he inquired of the citizenship or nationality of persons. He
27 also asked people if they could produce documents that permitted their presence in the
28 United States. When provided with such documentation, Deputy Chief Leonard would

1 inspect the documents.

2 He transferred to the Tucson Sector in 2008 as a Division Chief. He has been
3 assigned to stations in California, completed a few tours in Washington, D.C., and toured
4 Iraq. Deputy Chief Leonard has held every position from a GS-5 to a GS-15 in the Border
5 Patrol.

6 The Tucson Sector uses an integrated, multilayered approach to border security.
7 There is an interdependent relationship between the checkpoints and the immediate border,
8 between the checkpoints and the ports of entry, and between the checkpoints and the Border
9 Patrol stations.⁵ There is a front line deployment of personnel, technology, and tactical
10 infrastructure. The second line of defense consists of personnel and technology. There are
11 also border checkpoints along the 262 linear border miles from Yuma County to the New
12 Mexico state line. In the 90,000 square miles, there are eight Border Patrol stations and 11
13 Border Patrol checkpoints. With the exception of one, each major route of egress has a
14 Border Patrol checkpoint on it.⁶ There are nearly 4,000 Border Patrol agents in the Tucson
15 Sector. In other words, Border Patrol agents seek to prevent the further entry into the United
16 States of undocumented people by using horses, ATVs, aircraft, and checkpoints to make the
17 area a containment zone. Without checkpoints, roving patrol stops and agents in vehicles
18 would have to be used, which does not work well for the Border Patrol. Such methods result
19 in people fleeing from the agents, vehicle accidents, damage to private property, and innocent
20 persons being injured or killed. Checkpoints are manned 24 hours a day, seven days a week,
21 although they are occasionally closed due to inclement weather and/or staffing shortages.

22 The Tucson Sector command staff, with input from the Border Patrol Headquarters,
23 determine where checkpoints are located. They look for an area that is straight (avoiding a
24 blind curve in case traffic backs up), not in the middle of a major metropolitan city, and
25 where it would cut off all smaller routes of egress away from the border. Deputy Chief

26 ⁵The Office of Field Operations, rather than the Border Patrol, operates the ports of entry.

27 ⁶On the eastern side of the state, CBP is working with the Arizona Department of
28 Transportation to place an additional checkpoint.

Leonard testified:

So Tucson Sector would be responsible for the strategy as far as what do you need to further contain that particular area? And then we would reach out to Washington, D.C. and ask them for the resources so that we could establish a checkpoint. But we would also have to negotiate with community members and get their permission, negotiate with the Arizona Department of Transportation to get their authority, their permission. So it's a long, drawn-out process, but the strategy is devised at the local level.

TR, p. 84.

The SR80 checkpoint is located a little north of Tombstone and a little south of Benson. It is 61 miles from the immediate border. This checkpoint deals with people going northbound from Naco, Bisbee, and Douglas and includes a lot of tourists from Bisbee and Tombstone. All the agents stationed at the checkpoints have been trained at the Border Patrol academy. They are Border Patrol agents, but their position description is immigration officers. The Border Patrol agents are evaluated on a matrix related to immigration results and are trained in immigration law, nationality law, statutory law, and criminal law with a priority toward immigration law. They are also trained how to inspect various forms of identification and have some expertise in determining if documents are valid.

Referring to a map, *see* Ex.16, from February 20, 2015 through November of 2016, the vast majority of enforcement events took place along the immediate border in the Brian A. Terry station's area of responsibility.⁷ Red dots on the map, representing immigration-related events, show most enforcement events along the border, with a smattering of red dots to the north closer to the checkpoint. Deputy Chief Leonard stated:

And I'd like to point out, you see the Highway 80 checkpoint, the one we're talking about today, we look at all the immigration enforcement activities that took place in proximity to this checkpoint as people, from our intell (sic) indicates, that they're dropped off and asked to walk around the checkpoint to circumvent the Border Patrol agents at this checkpoint which is why you see all of the enforcement, the immigration enforcement activity here with a smattering of narcotic enforcement activity. And then you see quite a bit of immigration enforcement activity here with also a smattering of narcotic-related events.

TR, p. 53. The map also identifies narcotic-related events with green diamonds and weapons-related events with circles with guns in them. Event symbols are stacked upon

⁷This station was formerly known as the Naco Station.

1 other event symbols. Further, some of the red dots represent multiple persons in a group.
2 Events represented by gray symbols are enforcement events that were outside the area of
3 responsibility for the Brian A. Terry Station.

4 Within the last two to three months, cameras have been placed at the SR80
5 checkpoints. The cameras were added to address complaints regarding traffic backing up or
6 vehicles being held too long.

7 The SR80 checkpoint is located just north of SR82, as opposed to further south closer
8 to Tombstone, to prevent people from using SR82 to circumvent the checkpoint. The red
9 dots on the map show people who have been dropped off about 60 miles north of the border
10 and who are trying to walk around the checkpoint to avoid the Border Patrol agents at the
11 checkpoint. The roving agents on horseback, ATVs, and four-wheel drive vehicles attempt
12 to detect the people before they are able to reload into a vehicle.

13 According to the Arizona Department of Transportation, approximately 2,500 - 2,700
14 vehicles pass through the SR80 checkpoint in a 24-hour period. Deputy Chief Leonard did
15 not dispute the calculation of the Assistant United States Attorney ("AUSA") that about one
16 million vehicles travel through the checkpoint in one year.

17 At the primary area of the checkpoint, the agent performs the function of determining
18 the alienage or citizenship of the occupants of the vehicles. The secondary inspection area
19 is where people are referred if further examination of the documents, occupants, or vehicles
20 is needed. In the secondary inspection area, occupants can disembark the vehicles safely and
21 the agents can walk around the vehicles more safely with less risk of injury from other traffic.
22 As the singular purpose of the checkpoints is for immigration inspections, the agents ask the
23 occupants their citizenship or immigration status. If someone answers in the negative, the
24 agents ask for documentation. Agents will sometimes waive persons through if the agents
25 are familiar with them.

26 Every enforcement event, whether it results in an arrest or not, is entered into the
27 Enforcement Information Database ("EID"), Border Patrol's database. This includes all
28 apprehensions. When an apprehension occurs, the agents write a report and shortly thereafter

enter the information at the Wilcox Station where arrested persons are transported – these events may include multiple subjects. This occurs whether or not the case is referred to the U.S. Attorney’s Office for prosecution. However, typical or consensual encounters are not entered into the database. The data is overseen by ICE, but Border Patrol and the Office of Field Operations have the ability to retrieve statistics from the EID. It is from this data that Exs. 16, 17, and 18 were created.

Deputy Chief Leonard summarized the statistics included in Exhibit 14, which provides:

USBP Immigration and Narcotic Related Events at TCA’s 80 Checkpoints

February 20, 2015 - November 20, 2016

	CTN80 Checkpoint	
	02/20/2015 - 02/19/2016	02/20/2016 - 11/20/2016
Immigration Related* Events	33	11
Immigration Related* Arrests	72	17
Narcotics Related Events	67	38
Narcotics Related Arrests	89	44
Narcotics Related, Non-Immigration Related* Arrests	86	44
Other Arrests (All Non-Immigration*)	105	61

*Immigration Related included events with at least one of the following criteria:

- Incident type of AAS or CAS
- Includes a deportable alien
- Includes a subject presented for prosecution on an 8 USC 1324 charge

Ex. 14. Deputy Chief Leonard stated:

So the 105 nonimmigration arrests would also include the 86 narcotic-related nonimmigration-related arrests. And the same with the second column. The 61 all nonimmigration-related arrests would include the narcotic-related nonimmigration-related arrests.

TR, p. 68. The three-arrest difference between the Narcotics Related Arrests and the Narcotics Related, Non-Immigration Related Arrests reflect a narcotics-related event that also resulted in an immigration-related arrest. The difference between the Narcotics Related, Non-Immigration Related Arrests and the Other Arrests (All Non-Immigration) includes

1 outstanding arrest warrants, weapons-related arrests, etc. The chart only includes those
2 vehicles that resulted in an enforcement event; it does not include every one of the
3 approximate 2,700 vehicles that travel through the checkpoint daily. An arrest such as Ruiz-
4 Hernandez's would be included as a narcotics-related arrest and a non-immigration-related
5 arrest.

6 Transnational criminal activity includes both the alien smuggling organizations and
7 the drug trafficking organizations; the activities sometimes overlap. Deputy Chief Leonard
8 stated:

9 People are aware [the checkpoint's] there, and they attempt to either go through it
10 with: illegal aliens in the trunk; someone with a counterfeit doc; someone as an
imposter where it's a valid document but they're posing as the person who is on the
document and they're not that person; or a false claim to United States citizen.

11 TR, p. 70. The chart does not include deterrence or the persons apprehended trying avoid
12 the checkpoint by walking around it. While Border Patrol considers the aforementioned
13 statistics for the deployment of resources (personnel, technology, tactical infrastructure), it
14 is an immigration checkpoint and is staffed by immigration officers who are performing an
15 immigration check. Deputy Chief Leonard believes the data surrounding the checkpoints
16 bolsters the support for immigration checkpoints and shows the deterrent effect of the
17 immigration checkpoints. The checkpoints were deployed over a number of years,
18 addressing displaced traffic from other checkpoints. The use of checkpoints "is part of a
19 multifaceted, multilayered, interdependent, integrated, enforcement strategy." TR, pp. 71-72.
20 If the SR80 checkpoint were to be closed, an area of vulnerability would be created. The
21 entire area of responsibility is considered to determine the best areas to help displace and
22 deflect traffic. Replacing the checkpoint with roving agents would not be as effective as the
23 checkpoint which stops every vehicle from traveling further into the country; the area would
24 become the least or less-fortified area in the 262 miles of international border.

25 Deputy Chief Leonard is aware that, at the international border, vehicles may be
26 completely inspected and taken apart, while people may be detained and questioned. He
27 recognizes the law is different once a person is beyond the border. The checkpoint is a
28

1 second line of defense to the ports of entry.

2 Agents assigned to the primary inspection area do not wear video or audio recording
3 devices. Deputy Chief Leonard does not know if any checkpoints outside of the Tucson
4 Sector utilize such recording devices.

5 In 2006, more than 600,000 apprehensions or arrests occurred and over one million
6 pounds of narcotics flooded across the international border in the Tucson Sector. At that
7 time, there were less than 2,000 Border Patrol agents. The government has expended
8 significant resources in the Tucson Sector to contain the border. There are now
9 approximately 4,000 agents and there has been an increase in technology and tactical
10 infrastructure in the sector. Three checkpoints were initially established in about 1999, but
11 as Tucson became overwhelmed other checkpoints were established. There have been 11
12 checkpoints since at least 2011.

13
14 *D. Summary of the Testimony of Oscar Ruiz-Hernandez*

15 Ruiz-Hernandez speaks English pretty well, but it is not his native language. He is
16 a legal permanent resident; he came to the United States in 1986 and attended school in San
17 Diego, California.

18 Ruiz-Hernandez was arrested on February 19, 2016, at the SR80 checkpoint. At the
19 time, he was living in Agua Preita, Mexico, just south of Douglas, Arizona. His wife and
20 children live in Agua Prieta. Ruiz-Hernandez was working in Tucson, driving heavy
21 equipment. He would sometimes commute daily, while at other times he would stay in either
22 Tucson or Agua Prieta for two or three days at a time.

23 Ruiz-Hernandez approached the checkpoint on February 19, 2016, in the same manner
24 as when he previously had approached the checkpoint. He did not time his arrival to avoid
25 the presence of a canine. Ruiz-Hernandez was traveling at a normal rate of speed before he
26 got to the checkpoint and recalls seeing the signs notifying of the approaching checkpoint.
27 He reduced his speed when directed by the signs and, when a sign mandated a 15 miles per
28 hour speed limit, he was traveling at 10 miles per hours.

1 Ruiz-Hernandez stopped at the stop sign. He recognized Agent Lara at the hearing
2 as the man at the checkpoint that day; Agent Lara had not been at the checkpoint when Ruiz-
3 Hernandez had previously traveled through the checkpoint. He had all of his windows rolled
4 down so the agents could see the interior of the vehicle. Agent Lara asked if he was a U.S.
5 citizen or a permanent resident. Ruiz-Hernandez stated he was a permanent resident. The
6 agent requested his card. The vehicle remained in drive, with Ruiz-Hernandez's foot on the
7 brake. In retrieving the card from his left rear pocket, he took his left hand off of the steering
8 wheel; he was leaning with his right hand between the two seats so he could access the
9 pocket. Ruiz-Hernandez demonstrated how he used both hands to remove the card from his
10 wallet.

11 The agent did not look at the card, but told Ruiz-Hernandez to open the trunk within
12 one second of having received the card. The agent did not look at the card then Ruiz-
13 Hernandez as if he were comparing the photograph to Ruiz-Hernandez's face. After
14 receiving the card but before directing Ruiz-Hernandez to open the trunk, the agent asked
15 where Ruiz-Hernandez was going; Ruiz-Hernandez responded that he was going to Tucson.

16 Ruiz-Hernandez put the car in park so he could press the trunk release button. The
17 agent did not ask him whether he would open the trunk or tell him that he could not open the
18 trunk if he so chose. Ruiz-Hernandez stated:

19 Q. Why did you push the button that opened the trunk?

20 A. Because when he saw the card, he just saw the card and told me, "Open the
21 trunk." So I did. So I followed the rules, the law.

22 TR, p. 98.

23 This was the first time an agent had told Ruiz-Hernandez to open the trunk in this
24 manner; at other times, agents would ask if Ruiz-Hernandez was willing to open the trunk.
25 Agent Lara did not unholster his gun and did not threaten Ruiz-Hernandez.

26 A man had approached Ruiz-Hernandez at a gas station, asking Ruiz-Hernandez if he
27 could drive Ruiz-Hernandez's car. Ruiz-Hernandez does not know the name of the person,
28 but knows he lives in Mexico; Ruiz-Hernandez knew him from when he was doing farm

1 laboring work. Ruiz-Hernandez does not routinely lend his car to persons for whom he does
 2 not know their names; he does not know why he let the man drive the car that day.

3 If Ruiz-Hernandez were to be convicted in this case, he would lose his residency card.

4 5 *E. Indictment and Pending Motion to Suppress*

6 On March 16, 2016, Ruiz-Hernandez was indicted for Conspiracy to Possess with
 7 Intent to Distribute Marijuana and Possession with Intent to Distribute Marijuana.

8 On January 30, 2017, Ruiz filed a Motion to Suppress (Doc. 50). A Response (Doc.
 9 54) has been filed. Evidence and argument were presented to the Court on February 13,
 10 2017. Additionally, a Supplemental Memorandum (Doc. 64) and a (Response (Doc. 66) have
 11 been filed.

12 13 *II. Relevant Statistics Provided by the Government*

14 Based on the statistics provided by the government, during the 21-month period
 15 surrounding the arrest of Ruiz Hernandez, there were a total of 255 (72 + 17 + 105 + 61)
 16 arrests at the SR80 checkpoint. Of these arrests, 89 (72 + 17) were immigration related, 133
 17 (89 + 44) of them were narcotics related,⁸ and 33 (255 - 89 - 133) were neither immigration
 18 nor narcotics related. In other words, at the SR80 checkpoint from February 20, 2015
 19 through November 20, 2016, 35 % of the arrests were immigration-related, 52% of the arrests
 20 were narcotics-related, and 13 % of the arrests were neither immigration nor narcotics
 21 related. These statistics do not include arrests that occurred in the area immediately
 22 surrounding the checkpoint.

23 24 *III. Constitutionality of Immigration Checkpoints in General*

25 A seizure occurs when a vehicle is required to stop at a checkpoint. *See e.g. United*
 26 *States v. Fraire*, 575 F.3d. 929, 931 (9th Cir. 2009). While a seizure is normally

27 ⁸The Court's references to narcotics herein includes non-narcotic illegal drugs (e.g.,
 28 marijuana).

1 unreasonable absent individualized suspicion, the United States Supreme Court has
2 recognized that in certain situations, including some vehicle checkpoints, individualized
3 suspicion is not required. *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 37
4 (2000)).

5 The Supreme Court has determined that the government's legitimate interests
6 advanced by a temporary seizure at an immigration checkpoint outweigh the minimal
7 intrusion on a motorist's privacy. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-62
8 (1976); *Edmond*, 531 U.S. at 37 (citing *Martinez-Fuerte*) (“We have also upheld brief,
9 suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept
10 illegal aliens[.]”). The Court stated that it was holding “that stops for brief questioning
11 routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and
12 need not be authorized by warrant.” 428 U.S. at 566. As the Ninth Circuit Court of Appeals
13 has summarized, immigration checkpoints are constitutional when they are “limited to a few
14 brief questions about immigration, the production of immigration documents, and a 'visual
15 inspection of the vehicle . . . limited to what can be seen without a search.'” *United States*
16 *v. Preciado-Robles*, 964 F.2d 882, 884 (9th Cir. 1992) (quoting *Martinez-Fuerte*, 428 U.S.
17 at 556-558). Moreover, a motorist may be referred to a secondary inspection area for further
18 immigration questioning “in the absence of any individualized suspicion.” *Martinez-Fuerte*,
19 428 U.S. at 562.

20 The Ninth Circuit has set forth a two-step analysis to determine whether a checkpoint
21 set up by law enforcement is constitutional. *Fraire*, 575 F.3d at 932.

22 First, the court must determine whether the primary purpose of the [checkpoint] was
23 to advance the general interest in crime control. If so then the stop is per se invalid
24 under the Fourth Amendment. If the checkpoint is not per se invalid as a crime
25 control device, then the court must judge [the checkpoint's] reasonableness, hence its
26 constitutionality, on the basis of the individual circumstances. This requires
27 consideration of the gravity of the public concerns served by the seizure, the degree
28 to which the seizure advances the public interest, and the severity of the interference
with individual liberty.

Id. (internal quotations and citations omitted).

The first step is to determine the primary purpose of the checkpoint and whether that

1 purpose was to advance general interest in crime control. The government argues that the
2 primary purpose of the checkpoint at issue was to detect illegal aliens. Ruiz-Hernandez,
3 however, argues that this a pretext and that general crime control and/or narcotics interdiction
4 is the actual primary purpose.

5 Pursuant to the Supreme Court, "the United States has a substantial interest in
6 controlling the flow of illegal aliens [and] [c]arrying out a program of routine stops for brief
7 questioning at permanent checkpoints is effective in support of this interest." *United States*
8 *v. Vasquez-Guerrero*, 554 F.2d 917, 919 (9th Cir. 1977) (citing *Martinez-Fuerte*, 428 U.S.
9 at 556. In *United States v. Soto-Camacho*, 58 F. 3d 408 (9th Cir. 1995), the Ninth Circuit
10 stated:

11 Except for the potential influence of drug intelligence on the decision of when within
12 the month to activate it, the Jacumba Checkpoint does not differ in any material
13 respect from the temporary checkpoint at Camp Pendleton that we condoned in
14 Hernandez. Its primary purpose is to check for aliens, all vehicles are stopped, the
15 checkpoint is well identified, Border Patrol agents exercise no discretion over the
16 checkpoint's operation, and the stop itself involves a minimal intrusion.

17 58 F.3d at 411 (footnote omitted). In *Soto-Camacho*, the checkpoint was operational for
18 about ten days out of each month, with "historical data reflecting trends of alien entries, alien
19 smuggling, narcotics smuggling, and an evaluation of the peak periods of these trends" and
20 "harvest seasons[.]" *id.* at 410, included as factors used to determine when the checkpoint
21 would be operational. The historical data referred to included that "a large percentage of
22 checkpoint narcotic seizures involve alien principals (during the period from January 21,
23 1992 through April 24, 1994, 76% of the narcotic seizures at the Jacumba Checkpoint
24 involved alien principals)" and that:

25 Between January 21, 1992 and April 24, 1994, Border Patrol agents at the Jacumba
26 Checkpoint made at least 322 separate illegal alien seizures and apprehended 1,544
27 illegal aliens. During the same period, there were 68 seizures of controlled substances
28 discovered in vehicles and 87 persons were arrested as a result.

Id. at 410-11. After discussing *United States v. Watson*, 678 F.2d 765, 769 (9th Cir.) (*cert.*
denied, 459 U.S. 1038, 103 (1982)), *Soto-Camacho* found the stop and search of Soto-
Camacho had an "independent administrative justification," and "did not exceed in scope what
was permissible under that administrative justification." *Soto-Camacho*, 53 F.3d at 412,

1 (citing *Watson*, 678 F.2d at 771).

2
3 *IV. Purpose of the SR80 Checkpoint*

4 Deputy Chief Leonard testified that the purpose of the SR80 checkpoint is for
5 immigration inspections. This is corroborated by the agents asking the occupants of vehicles
6 their citizenship or immigration status and inspecting identification/immigration documents.
7 Indeed, the integrated approach (between the border, ports of entry, checkpoints, and Border
8 Patrol stations) to border security and multi-faceted deployments (of personnel, technology,
9 and tactical infrastructure) emphasizes the Border Patrol's focus is for immigration purposes.
10 Further, considering the volume of traffic and the safety concerns as stated reasons for the
11 use of checkpoints, along with the success of checkpoints, refutes claims that immigration
12 enforcement is a pretextual purpose for the checkpoints. Additionally, immigration officers
13 are evaluated on a matrix related to immigration results and are trained in immigration law,
14 nationality law, statutory law, and criminal law with a priority toward immigration law – this
15 similarly corroborates the government's assertion the primary purpose of the checkpoints is
16 for immigration enforcement.

17 Ruiz-Hernandez, however, argues that the enforcement of narcotics laws and the
18 specific statistics in this case make the checkpoint unconstitutional. Indeed, checkpoint stops
19 constitute a "seizure" within the meaning of the Fourth Amendment. *Edmond*, 531 U.S. at
20 34 (stop at drug checkpoint constitutes a "seizure"). However, the Supreme Court has made
21 distinctions between checkpoints whose purpose is to control the flow of illegal aliens as
22 compared to a checkpoint established to interdict drug trafficking. *Edmond*, 531 U.S. at 41.
23 When law enforcement pursues general crime control purposes at checkpoints, any stop must
24 be justified by some quantum of individualized suspicion. *Id.* at 47. Additionally,
25 "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions
26 undertaken pursuant to a general scheme without individualized suspicion[.]" *Id.* at 45.
27 Indeed, the Ninth Circuit has stated that "where officers have broad discretion as to the
28 parameters of the search, the addition of an impermissible motive extends the scope of the

1 search, regardless of whether the items searched could have been subject to a valid
2 administrative search." *United States v. Bulacan*, 156 F.3d 963, 970 (9th Cir. 1998), as
3 amended (Nov. 16, 1998); *see also Hernandez*, 739 F.2d at 488 (for *Martinez-Fuerte* to
4 apply, checkpoint need not operate all the time or be at a permanent structure; important
5 factor is lack of discretion when operated). Except for a few known local residents, the
6 agents consistently follow the same procedure and are not granted discretion at the SR80
7 checkpoint.

8 Ruiz-Hernandez argues that CBP has transformed the limited stop approved in
9 *Martinez-Fuente* into a dual purpose checkpoint. As one of those purposes is investigating
10 illegal drug trafficking, which is not permitted under *Edmond*, Ruiz-Hernandez asserts
11 Border Patrol has violated his Fourth Amendment rights.

12 In *United States v. Barnett*, 935 F.2d 178, 181 (9th Cir. 1991) (citing *Horton v.*
13 *California*, 496 U.S. 128 (1990), the Ninth Circuit stated that, although the Supreme Court's
14 conclusion that checkpoints were constitutional in the limited immigration context, it "does
15 not mandate an inquiry into the subjective purpose of the agent making referrals to secondary
16 inspection, unless there is some objective evidence supporting the charges of pretext." *Id.*
17 at 181. Indeed, the Ninth Circuit determined there was no constitutional violation where
18 Border Patrol agents at an immigration checkpoint were cross-trained in narcotics detection.
19 *United States v. Soyland*, 3 F.3d 1312, 1314 (9th Cir. 1993). Further, the Ninth Circuit has
20 concluded that intelligence regarding narcotics trafficking that affected the timing of an
21 immigration checkpoint did not make the stop improper. *Soto-Camacho*, 58 F.3d at 412.

22 There is no basis to conclude that *Edmond* implicitly overruled this line of Ninth
23 Circuit cases. Rather, the *Edmond* Court was discussing a checkpoint whose primary
24 purpose was to interdict illegal narcotics. In fact, the Court specifically stated that it was not
25 deciding whether law enforcement could establish a checkpoint with a valid primary purpose
26 and a "secondary purpose of interdicting narcotics." *Id.* at 47, n. 2. Because the *Edmond*
27 Court did not decide this issue, any reliance of Ruiz-Hernandez on *Edmond* is misplaced
28 unless the primary purpose of the SR80 checkpoint is for general crime or narcotics

interdiction.

Additionally, the Fifth Circuit has determined, post-*Edmund*, that a checkpoint with a primary immigration purpose was constitutional “regardless of whether or not it could also be said to have a secondary programmatic purpose of drug interdiction.” *United States v. Moreno-Vargas*, 315 F.3d 489, 491 (5th Cir. 2002). While this case does not provide precedential value, it does constitute persuasive authority. Additionally, judges in the District of Arizona have recently concluded that a secondary purpose of drug interdiction or the use of a cross-trained canine at an immigration checkpoint does not make the immigration checkpoint unlawful or transform the checkpoint into a general crime control device. *United States v. Wilson*, 650 Fed.Appx. 538 (9th Cir. May 27, 2016); *United States v. Romero-Cubillas*, No. CR-15-00374-TUC-RCC-LAB, 2015 WL 6579720 (D. Ariz. Sept. 25, 2015).

The Ninth Circuit has stated:

Had [defendants] offered affirmative evidence that the first agent harbored a subjective purpose to refer to secondary inspection for drug-related offenses, we would be required to address the applicability of the cases that deal with pretextual seizures to the type of stop authorized by *Martinez-Fuerte*. [Citations omitted.] But in the absence of that evidence, we need not reflect upon the applicability of *Martinez-Fuerte* to referrals where it appears that the referral is only (or even partially) for drugs. [Defendants] have offered no evidence why this was not a legitimate immigration stop. The agent at initial inspection offered evidence consistent with an immigration purpose.⁴ Thus, *Martinez-Fuerte* controls. No articulable suspicion was required.

⁴See *United States v. Watson*, 678 F.2d 765, 771 (9th Cir. 1982), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982):

We assume that the administrative plan which led to the boarding of the [vessel] was motivated partly by suspicion of drug smuggling. However, the stop and search had an independent administrative justification, and did not exceed in scope what was permissible under that administrative justification. Therefore, we need not consider any criminal enforcement interest the Coast Guard may have had.

Barnett, 935 F.2d at 181-82.

Because the Supreme Court has left open this issue and the authority before the Court allows for a checkpoint with illegal alien control as its primary purpose and general crime interdiction as a secondary purpose, the Court finds the SR80 checkpoint is constitutional.

1 The stated purpose of the SR80 checkpoint is illegal immigration control. Indeed, the nature
2 of the original questions asked of Ruiz-Hernandez by Agent Lara were immigration-related
3 and supports a conclusion the primary purpose of the checkpoint is immigration control; i.e.,
4 no non-immigration related questions were asked prior to the request to look in the trunk.
5 Moreover, although the statistics provided by the government establish that a majority of the
6 arrests (52 %) for a 21-month period surrounding Ruiz-Hernandez's arrest were narcotics
7 related (as compared to 35 % for immigration related arrests and 13 % for neither
8 immigration nor narcotics related arrests), these statistics do not take into account the illegal
9 immigration arrests made in the surrounding areas, the deterrence caused by the presence of
10 the SR80 checkpoint, or the integrated, multilayered approach to border security which
11 considers the relationships between the border, all of the checkpoints in the sector, the ports
12 of entry, and the Border Patrol stations. Indeed, the "formidable law enforcement problems"
13 posed by the northbound tide of illegal entrants into the United States, *Edmond*, 531 U.S. at
14 25 (quoting *Martinez-Fuente*, 428 U.S. at 551-54), supports a conclusion the primary purpose
15 of the SR80 checkpoint was to control the flow of illegal immigrants.

16 Further, that agents at the checkpoint enforce laws other than immigration laws does
17 not diminish the agents' focus and training on the identification and detection of illegal
18 aliens. This corroborates the government's assertion the primary purpose of the SR80
19 checkpoint is to control the flow of illegal aliens. Indeed, the fact that agents also enforce
20 laws other than immigration-related or narcotics-related (e.g., weapons offenses) supports
21 a conclusion the primary purpose of the SR80 checkpoint is not for narcotics/drug
22 interdiction.

23 Additionally, placing significant weight on a snapshot of the events and arrests at the
24 checkpoint in a primary purpose analysis would allow for potential manipulation of law
25 enforcement efforts by drug cartels. If a significant percentage of arrests/seizures involving
26 narcotics warranted a determination that a checkpoint was unconstitutional, drug cartels
27 could arrange for significant narcotics trafficking through a specific checkpoint until it was
28 deemed unconstitutional . . . and then more freely be able to subsequently transport narcotics

1 through that area after the unconstitutional checkpoint was closed. Further, if CBP was not
2 permitted to act on other offenses, drug cartels could potentially modify their procedures to
3 take advantage of this failure. As Deputy Chief Leonard testified, in such a situation, this
4 area would become the least or less-fortified area of the 262 miles of international border
5 within the Tucson Sector.

6 Therefore, where agents have only limited discretion, neither the statistics nor an
7 additional motive of enforcing other laws are significant factor in determining the primary
8 purpose of a checkpoint. Here, the agents have minimal discretion. However, the Court has
9 considered these factors, the evidence and the circumstances presented in this case and
10 determines the primary purpose of the SR80 checkpoint is for immigration enforcement. The
11 use of the checkpoint on SR80, considering its proximity to the international border and high
12 volume of traffic (including illegal alien traffic on SR80 and in the area) is reasonable. The
13 public concerns and the substantial interests of the United States in controlling the flow of
14 illegal aliens, which are significantly advanced by the use of the SR80 checkpoint (in
15 conjunction with the integrated efforts of the Border Patrol, supports a determination the
16 SR80 checkpoint is constitutional. Moreover, the interference with individual liberty is
17 minimal. Indeed, only a few questions are asked unless there is a basis for referral to the
18 secondary inspection area. The Court finds the SR80 checkpoint is constitutional.

19
20 *V. Extension of the Stop for Non-Immigration Purposes*

21 Ruiz-Hernandez implicitly argues that the extension of the stop to look in the trunk
22 of the car made the search unlawful. In other words, he asserts the stop was prolonged
23 beyond the time beyond it was required to ask ““a brief question or two and possibly [ask
24 for] the production of a document evidencing a right to be in the United States.””
25 *Martinez-Fuerte*, 428 U.S. at 558 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 880
26 (1975).

27 In essence, it seems Ruiz-Hernandez is asserting it is unconstitutional for law
28 enforcement, while pursuing one law enforcement goal, to potentially address alternate or

1 collateral law enforcement goals. However, the Supreme Court has not limited law
2 enforcement in such a manner in other respects. Rather, the Supreme Court stated that it's
3 holding in *Edmond* does not "alter the constitutional status" of the border checkpoints
4 approved in *Martinez-Fuerte*. 531 U.S. at 47. Indeed, the holding in *Edmond* "does not
5 impair the ability of police officers to act appropriately upon information that they properly
6 learn during a checkpoint stop justified by a lawful primary purpose, even where such action
7 may result in the arrest of a motorist for an offense unrelated to that purpose." *Id.* at 48.

8 Ruiz-Hernandez has not pointed to any authority, in any context, where law
9 enforcement is precluded from taking action on a collateral law enforcement goal when they
10 learn of it during the original encounter. For example, a traffic officer is not required to
11 ignore a strong odor of marijuana he notices as he is conducting the traffic violation stop.
12 The Supreme Court has held that "the tolerable duration of police inquiries in the traffic-stop
13 context is determined by the seizure's 'mission' – to address the traffic violation that
14 warranted the stop, and attend to related safety concerns." *Rodriguez v. United States*, 135
15 S.Ct. 1609, 1614 (2015). However, "[a]n officer . . . may conduct certain unrelated checks
16 during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the
17 stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."
18 *Id.* "The odor of marijuana emanating from a vehicle stopped during a lawful traffic stop is
19 alone sufficient to constitute probable cause for a subsequent search of that vehicle for
20 marijuana." *United States v. Collier*, No. EDCR 13-19 JGB, 2015 WL 11123302, at *7
21 (C.D. Cal. Nov. 10, 2015) (citing *United States v. Barron*, 472 F.2d 1215, 1217 (9th Cir.
22 1973). According to the Supreme Court, officers may "act appropriately upon information
23 that they properly learn during a checkpoint stop justified by a lawful primary purpose, even
24 where such action may result in the arrest of a motorist for an offense unrelated to that
25 purpose." *Edmond*, 531 U.S. at 48.

26 As the Court discusses herein, the Court finds the search of the trunk was pursuant to
27 the voluntary consent of Ruiz-Hernandez. As the agent acted lawfully while he was in a
28 position he was entitled to be in, and the search was pursuant to the consent of Ruiz-

Hernandez, the Court finds the search of the trunk was constitutional.

VI. *Consent to Search the Trunk*

“[A] search conducted pursuant to a valid consent is constitutionally permissible.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). “The Fourth Amendment test for a valid consent to search is that the consent be voluntary . . .” *Ohio v. Robinette*, 519 U.S. 33, 40 (1996). A court must examine the totality of the circumstances. *United States v. Mendenhall*, 446 U.S. 544, 557 (1980); *United States v. Patayan Soriano*, 361 F.3d 494, 501 (9th Cir. 2004). Additionally, the burden is on the government to prove that consent was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

The government must prove voluntary consent by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177 (1974). However, “[m]ere acquiescence to lawful authority is insufficient” to constitute consent. *United States v. Spires*, 3 F.3d 1234, 1237 (9th Cir. 1993). While consent to a search may be express or implied, *Morgan v. United States*, 323 F.3d 776, 781 (9th Cir. 2003), “[t]he government always bears the burden of proof to establish the existence of effective consent This burden is heavier where consent is not explicit, since consent ‘is not lightly to be inferred.’” *United States v. Impink*, 728 F.2d 1228, 1232 (9th Cir. 1984) (citations omitted). Moreover, “[u]nder certain narrow circumstances, ‘courts will infer consent from the cooperative attitude [and conduct] of a defendant.’”

Five factors are relevant in the determining voluntariness of consent:

- a. whether defendant was in custody;
- b. whether the arresting officers had their guns drawn;
- c. whether *Miranda* warnings were given;
- d. whether the defendant was notified that [he] had a right not to consent; and
- e. whether the defendant had been told a search warrant could be obtained.

United States v. Basher, 629 F.3d 1161, 1168 (9th Cir. 2011). These factors are not exhaustive, nor is any one determinative; rather, they are “guideposts” only. *Patayan Soriano*, 361 F.3d at 502.

Here, the issue is not so much the voluntariness of the consent, but a factual dispute

1 as to whether Ruiz-Hernandez consented at all. Ruiz-Hernandez points out that the
2 government could have made/presented a video or audio recording to show what occurred
3 or what was said – the government did not do so. However, in considering the credibility of
4 Agent Lara and Ruiz-Hernandez, the Court considers that Ruiz-Hernandez has more of a
5 motive to be untruthful: not only is he at risk of a felony conviction, but his legal permanent
6 status may be revoked. Additionally, the Court considers that Ruiz-Hernandez testified he
7 does not routinely lend his car to persons for which he does not know their names, he does
8 not know why he let the man drive the car that day, and he did not know how long the car
9 was out of his possession; further, this occurred in the middle of Ruiz-Hernandez's commute
10 to his employment (i.e., causing delay). Ruiz-Hernandez's failure to provide any reason for
11 these decisions raises additional credibility concerns. However, the Court does find Ruiz-
12 Hernandez's explanation of how he removed his identification (using both hands) to be
13 credible. Nonetheless, Ruiz-Hernandez's self-interest and vague answers as to why he
14 allegedly acted as he did on February 19, 2016, leads to a conclusion that Ruiz-Hernandez
15 is not credible as to the whether or not he voluntarily consented to Agent Lara looking in the
16 trunk of the car. The Court finds that Agent Lara does not have any significant self-interest
17 in the outcome of these proceedings. Further, the Court does not find the factual dispute as
18 to where Ruiz-Hernandez's hand were during the entire encounter to undermine Agent Lara's
19 testimony as to the conversation between Agent Lara and Ruiz-Hernandez. The Court finds
20 Agent Lara to be credible.

21 The Court finds, therefore, that Ruiz-Hernandez consented to allowing Agent Lara to
22 look in his trunk. The consent was given while Ruiz-Hernandez was not in custody and
23 while Agent Lara (nor any other agent) had his gun drawn. Although *Miranda* warnings
24 were not given, Ruiz-Hernandez was not notified that he had a right to refuse the agent's
25 request, and Ruiz-Hernandez had not been told a search warrant could be obtained, this case
26 does not present a situation like that in *United States v. Chan-Jimenez*, 125 F.3d 1324 (9th
27 Cir. 1997), a case cited by Ruiz-Hernandez. In *Chan-Jimenez*, the driver of a vehicle had
28 pulled over to the side of the road and raised the hood of his pickup truck. The officer pulled

1 up behind the truck, activated his emergency lights, and subsequently identified himself as
2 a police officer. The officer requested the driver's license and registration – he confirmed
3 the documents were “in order.” Without returning the documents or inquiring if the driver
4 was experiencing any problems, the officer asked if he could conduct a search and look in
5 the bed of the truck. While he made this inquiry, the officer had his hand on his revolver
6 (where he kept it throughout the encounter). The driver did not verbally respond, but moved
7 to the rear of the truck and raised the tarp over the bed of the truck. The Ninth Circuit stated:

8 When a law enforcement official retains control of a person's identification papers,
9 such as vehicle registration documents or a driver's license, longer than necessary to
10 ascertain that everything is in order, and initiates further inquiry while holding on to
11 the needed papers, a reasonable person would not feel free to depart.


12 125 F.3d at 1326. The court considered the circumstances surrounding the encounter; i.e.,
13 the driver had stopped his vehicle on his own, the driver had raised the hood of the truck, the
14 officer had pulled behind the truck and activated his emergency lights, the officer had his
15 hand on his revolver, the officer had not asked if the driver was having any problems with
16 the truck, and the officer asked for and retained the documents after determining they were
17 in order. The court stated, “The officer's actions made it clear that he had not simply stopped
18 out of concern over the plight of a stranded motorist.” *Id.*

19 In this case, however, Agent Lara was initially focused on his designated immigration
20 control efforts, had not completed his determination of whether Ruiz-Hernandez's documents
21 were in order, had observed nervous behavior, and did not unholster his weapon or place his
22 hand on his weapon. “[T]he fact that some factors are not established does not automatically
23 mean that the defendant's consent to search was not voluntary.” *United States v.*
24 *Torres-Sanchez*, 83 F.3d 1123, 1130 (9th Cir. 1996), as amended (July 15, 1996) (citation
25 omitted); *United States v. Russell*, 664 F.3d 1279, 1281 (9th Cir. 2012). As paraphrased from
26 *Torres-Sanchez*, because Ruiz-Hernandez was not under arrest at the time consent was given,
27 *Miranda* warnings were not necessary. The agent requested consent only after observing
28 nervous conduct. Furthermore, no guns or other signs of force were used to coerce consent
from Ruiz-Hernandez. “[U]pon review of the totality of the circumstances, [the Court holds]

1 that [Ruiz-Hernandez's] consent to search the [trunk] was voluntary." *Torres-Sanchez*, 83
2 F.3d at 1130.

3 Accordingly, IT IS ORDERED the Motion to Suppress (Doc. 50) is DENIED.

4 DATED this 16th day of March, 2017.

5
6 
7 Cindy K. Jorgenson
8 United States District Judge
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